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In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 179.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Petitioner,

vs.

JOHN F. GUENTHER,
Respondent.

BRIEF OF RESPONDENT.

JAMES G. BACHMAN,
Counsel for Respondent.

EUGENE QUIGLEY,
WILLIAM M. BYRNES,
Of Counsel.

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Respondent.

BRIEF OF RESPONDENT.

FACTS.

The facts in this case are not in dispute. At the time the automobile of Guenther was involved in an accident the following provision of the General Code of Ohio was in full force and effect:

> "Section 13002. No child under the age of 16 years shall be employed, permitted or suffered to work in any capacity * * * 13, nor in operating any automobile, motor car or truck; * * *."

There was also in effect the following Lakewood municipal ordinance:

> "It shall be unlawful for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of 18 years to operate or run said motor vehicle upon the public highways, streets or alleys in said City of Lakewood."

The clause of the insurance policy, the interpretation of which by the Courts below is here questioned, is as follows:

EXCLUSIONS

Paragraph A

THIS POLICY SHALL NOT COVER ANY LIABILITY OF THE ASSURED

3. While (any of the insured automobiles is) being operated by any person under the age limit fixed by law or under the age of 16 years in any event.

The respondent's employe was over 16 and under 18 years of age.

QUESTIONS INVOLVED.

I. Did section 13002, General Code of Ohio, fix an age limit for the operator of respondent's automobile?

II. Did the ordinance fix an age limit?

III. Is a municipal ordinance a "law" within the meaning of the term "fixed by law" as used in the insurance policy issued to Guenther?

Counsel for petitioner has ignored entirely the first two questions and has devoted his entire brief to the third.

ARGUMENT.

I.

DID SECTION 13002 OF THE GENERAL CODE OF OHIO FIX AN AGE LIMIT FOR THE OPERATOR OR RESPONDENT'S AUTOMOBILE?

The case was disposed of in the District Court and in the Court of Appeals on the theory that there was no general law regulating the age of the operators of automobiles, although the state legislature did in fact provide in Section 13002 the following—

"No child under the age of 16 years shall be employed, permitted or suffered to work in any capacity * * * 13 nor in operating any automobile, motor car or truck; * * *."

Thus the state legislature has in fact fixed 16 as the minimum age at which one may employ a person to operate an automobile and since it conceded that the operator of Guenther's automobile was over 16, at the time of the Kroger accident, the insured automobile was not being operated by any person under the age limit fixed by law. Therefore the insurance company was in error in denying liability and the judgments of the Courts below were correct because the state law as to age was not being violated.

II.

DID THE ORDINANCE FIX AN AGE LIMIT?

The clause of the insurance policy above quoted has to do with the age limit of *automobile drivers* as fixed by law. A most casual reading of the Lakewood ordinance discloses that it *does not prescribe an age limit for the operator of an automobile.* In other words, it is *not a violation of the ordinance* for a minor under the age of 18 years to operate a motor vehicle on the public highways of Lakewood. This being true, how can it be said that Theodore Winter, Guenther's driver, was operating the automobile in violation of the municipal ordinance?

We feel, therefore, that counsel's entire argument is all beside the point, because the car was *not* being operated *"by any person under the age limit fixed by law,"* nor was it being operated by any person under the age limit fixed by a *municipal ordinance.*

In the case of *Mannheimer Brothers vs. Kansas Casualty and Surety Company,* 147 Minn. 350, a clause in an insurance policy similar to the clause in the case at bar was

under consideration by the court. The clause read as follows:

> "This policy does not cover in respect of any automobile while driven or manipulated by any person contrary to the statutory age limit of any state or under the age of 16 years where there is no age limit."

The surety company refused to defend its assured because of the alleged violation of a statutory provision as to the age of the driver. Section 2621 of the G. L. 1913 declared no person under the age of 16 shall drive a motor vehicle unless accompained by the owner or a duly licensed chauffeur. Section 2638 directs that a license shall not be issued to any person under 18.

Sampson was over 16 but under 18, and was therefore not entitled to receive a license, though a license was in fact issued to him. The surety company contended that the insured's automobile was being driven by a person under the minimum fixed by statute for licensed chauffeurs, to-wit: 18 years. The court in construing the policy held that the statute provided merely that no license should be issued to one under 18 but that it did not expressly prohibit one under 18 from driving as a hired chauffeur—it prohibited one under 18 from driving as a chauffeur without a license; that the omissions as well as the contents of the statute are significant and must be construed in arriving at a correct construction.

It will be observed that this case had to do with a state statute and not with a city ordinance and yet the logic employed by the court is very applicable to the case at bar. The policy prohibits one under the age limit fixed by law from driving the automobile but the ordinance does not fix a minimum age for drivers, and the omissions as well as the contents of the ordinance are significant.

Charles W. Brock vs. Travelers Insurance Company, 88 Conn. 308,

"A policy issued to the owner of an automobile to indemnify him against loss for bodily injuries accidentally inflicted upon another, provided that the insurer should not be liable while the automobile was being driven by any person 'under the age fixed by law,' or under the age of 16 in any event. Held: that this clause had reference solely to the minimum age (not less than 16) at which one might lawfully drive a motor vehicle and that inasmuch as paragraph 5 of Chapter 85 of the Public Acts of 1911 expressly permitted a person 16 years or more, although not licensed, to drive a motor vehicle in this state if accompanied by a licensed operator, 16 must be regarded as the minimum age fixed by law and therefore the insurance company would not escape liability under this proviso for a loss sustained by the insured while his car was driven by an unlicensed person over 16 merely because of the non-observance upon the occasion in question of the statutory requirement that a licensed operator should accompany the unlicensed driver, a requirement which had no relevancy whatever to the age of the driver."

Plaintiff's son between 16 and 17 years of age was not licensed to operate an automobile and was not accompanied by a licensed operator. The company refused to indemnify upon the ground that at the time of the accident the automobile was being driven by a person under the age "fixed by law." The Court said

> "*Our statute does not in direct terms fix the age at which it shall be unlawful for a person to operate a motor vehicle* on the public highways."

The Act provides that no person under 18 may obtain a license and none but a licensed operator may operate a car. The Court said that if the operator were accompanied by a licensed chauffeur no claim could have been made that the operator was under the age fixed by law.

III.

IS A MUNICIPAL ORDINANCE A LAW WITHIN THE MEANING OF THE TERM "FIXED BY LAW" AS USED IN THE INSURANCE POLICY ISSUED TO GUENTHER?

1. Petitioner's Claim That "The Commonly Accepted Meaning of the Word 'Law' Includes Municipal Ordinances" is Erroneous.

The definition of law as quoted from Blackstone on page 10 of petitioner's brief is not in our opinion Blackstone's complete definition, and we therefore desire to call the Court's attention to the definition of "law" quoted by the Supreme Court of Ohio in the case of *Devine vs State, ex rel. Tucker, Jr.*, 105 O. S., 288, wherein the court said on page 290:

> "It is refreshing to return to some of the old landmarks of the law. Nothing has led to more confusion in the consideration and determination of the law than lack of clear and correct definition of the thing to be considered and determined. That master of legal definition in the English law, Sir William Blackstone, more than a century and a half ago, laid down this definition of law:
>
> "'A rule of civil conduct prescribed by the *supreme power in a state,* commanding what is right and prohibiting what is wrong. (1 *Blackstone's Commentaries,* 44.)'
>
> "Our American courts with substantial unanimity have approved that definition, with this addition, that such command and prohibition shall not be in clear conflict with our organic law, our written constitutions."

It thus follows that the ordinarily accepted meaning of the word "law" is that it is a rule of civil conduct prescribed by the supreme power in the state. The supreme power in a state is the state legislature, composed of a senate and a house of representatives, and any rule of civil conduct passed by a state legislature is always designated as a law, and never as an ordinance.

Counsel claims that automobile traffic within municipalities in Ohio is largely regulated and controlled by ordinances. In this he is mistaken, for a reference to the General Code of Ohio discloses that the supreme power in the State of Ohio, to wit: the legislature, has enacted a great many laws regulating almost every phase of the ownership, sale, use and operation of automobiles. These sections are 13002, 6290 to 6310-37 and 12603 to 12628-1 of the General Code, a total of seventy-six sections, and since the legislature of the state has enacted laws regulating the operation of automobiles, and fixing the minimum age of an employed operator, it is reasonable to suppose that these were the *laws* the insurance company had in mind in preparing its contract. As stated by the trial court in his opinion, if the insurance company really intended the violation of a municipal ordinance to forfeit the policy, it could have easily said so in language which would admit of no doubt of such intention. As a matter of fact insurance companies desiring to forfeit a policy for the violation of a municipal ordinance, so provide in their policies.

Counsel cites the case of *Imperial Fire Insurance Company vs. Coos County,* 151 U. S. 452. That case holds among other things the following:

> "2. When an insurance contract is fairly susceptible of two different constructions, that construction will be adopted which is most favorable to the insured."

The suit was on a fire insurance policy and under its terms the County was prohibited from occupying the premises so as to increase the risk or from employing mechanics to alter or repair the same without written permission. The county employed mechanics and made extensive alterations without written permission as provided by the policy and, after a fire occurred, the insurance company refused to pay on the theory that the premises had

been altered and mechanics employed in that work. In this case there could be no reasonable doubt as to the meaning of the terms involved.

2. The Construction Adopted by the Courts Below Does Not Deprive the Insurance Policy of All Meaning and Effect.

Counsel claims that if the construction placed upon the word "law" by the Courts below is to be approved, an important clause of the policy would be deprived of meaning and effect. (Page 11 of his brief) This we deny. On the contrary were the Court to adopt the construction contended for by Counsel for petitioner the entire contract would be destroyed. His argument is that, since the state legislature saw fit not to enact a minimum age law for all drivers of automobiles, the court should enact a rule that in effect would nullify and forfeit the insurance granted by the contract, even though the skilled counsel for the insurance company who prepared the contract intentionally so phrased his contract that the word "ordinance" was not included, and therefore intentionally left the meaning of the policy, to say the least, in doubt. The construction contended for by petitioner violates all the usual rules of construction of insurance policies.

These rules are found in the opinion of Judge Spear in the case of *Webster vs. Insurance Company*, 53 O. S. 558:

> "A primal rule is that forfeitures are not favored either in equity or at law; indeed, it is declared as a universal rule that courts of equity will not lend their aid to enforce a forfeiture. Following as a corollary from this, provisions for forfeiture are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced. It is also a familiar rule of law, that if it be left in doubt, in view of the general tenor of the instrument and the relation of the contracting parties, whether given words were

used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee."

It is true that every part of an insurance contract should be considered in arriving at an interpretation thereof, and that no part of a policy should be rejected as insensible or inoperative if a rational and intelligent meaning can be given to it, and we respectfully submit that in the case at bar a rational and intelligent meaning can be given to the word "law" as used in this policy by giving to that word the meaning that people ordinarily ascribe to it, namely, a law passed by the state legislature, and by giving this meaning to the word the court will be construing the policy so as to enforce and not to forfeit it.

3. The Decisions of the Supreme Court and of the Circuit Court of Appeals do Not Hold That Ordinances Are Laws Within the Meaning of an Insurance Policy.

Counsel criticises the Courts below because of a distinction drawn between laws of a state and ordinances of a municipality, and in support of that criticism cites on page 12 of his brief *Iron Mountain R. Company vs. Memphis,* 96 Fed. 113. This case involved the construction of the 14th Constitutional Amendment prohibiting any state from depriving any person of property without due process of law and held that the City of Memphis could not, by passing a resolution, forfeit rights. We quote from the syllabus as follows:

> 1. The exercise by a city of its general power given it by the Legislature of controlling the streets and of making and enforcing contracts with reference to their occupancy by individuals or corporations, is action by the state *within the meaning of the provision of the first section of the 14th Constitutional Amendment* which prohibits any state from depriving any

person of property without due process of law and the passage of a resolution by the council of a city assuming to declare a forfeiture of a contract previously made with a railroad company under which the company occupies a street with its tracks and a declaration by the city of its intention to dispossess the company and take possession of the street by the use of its police is a threatened violation of a constitutional right of the company which a Federal Court has jurisdiction to restrain by injunction.

* * * * *

3. A resolution of a city council passed with all the form required for the passage of an ordinance asserting that there has been a breach by a railroad company of a contract by which the city granted to it an easement and franchise in a street and declaring a forfeiture of the rights granted and a resumption of possession of the street by the city, although conditioned upon a failure of the company to comply with certain requirements within a specified time, which time has elapsed, and the condition has not been complied with is a law of the state *within the meaning of Section 10 of Article I of the Constitution against the impairment* by a state of the obligation to contract.

This case simply decides that the Council of City of Memphis could not by the mere passing of an ordinance or resolution deprive a private individual of his property but was obligated to file its action in Court and follow the orderly procedure provided by law.

The next case cited by counsel for the plaintiff is that of *New Orleans Water Works vs. Louisiana Sugar Company,* 125 U. S. 18, 30. This Court simply construed the 14th Amendment and held that the ordinance in question was not in violation of that Amendment. The facts briefly are as follows:

The Water Works Company was chartered to supply water to the City of New Orleans from the Mississippi

River and it was given the exclusive privilege of supplying water to the inhabitants of the city and of using the public highways to construct its conduits, etc., and apparently there was nothing to prohibit those along the river from obtaining their own water supply if they cared to do so. The sugar company in this case was given permission, by ordinance, to lay water and sewage pipes from its factory to the river. An injunction was sought by the water company on the theory that the city in granting the sugar company permission to construct these conduits was violating the terms of its exclusive franchise. A writ of error to the United States Supreme Court was allowed on the theory that the ordinance in question was in violation of the Constitution of the United States. The writ was dismissed for want of jurisdiction.

On page 30 of the opinion the Court said that the prohibition is aimed at the legislative power of the State and then a quotation is made from an opinion of Mr. Justice Miller as follows:

> "It must be the Constitution or some law of the state, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the state court must sustain the law or Constitution of the State, in the matter in which the conflict is supposed to exist, or the case for this court does not arise."

The Justice then cites the opinion of Mr. Justice Field in *Williams vs. Bruffy*, 96 U. S. 176, as follows:

> "Any enactment, from whatever source originating to which a State gives the **force of law**, is a statute of the state within the meaning of the clause cited * * *."

and then the Court goes on to say that portion of the opinion cited by counsel in his brief on page 13.

"So a by-law or ordinance of a municipal corporation *may be such* an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state having all the *force of law* within the limits of a municipality, that *it may* properly be *considered as a law within the meaning of this article of the Constitution of the United States.*"

In the case of *Cumberland Telephone and Telegraph Company vs. City of Memphis,* 198 Federal 955, the Court simply held that a municipal council could not pass an ordinance impairing the obligation of contract.

How does it avail counsel to argue to this Court in support of his contention that the Supreme Court of the United States will not sustain a municipal ordinance which impairs the obligation of contract or takes property without due process of law? Does the fact that the Supreme Court construes liberally the Federal Constitution to prevent forfeitures and assumes jurisdiction in such cases in order to examine into such claimed forfeitures support the strained contention that an ordinance is a law within the meaning of an insurance policy? Will this Court supply in the insurance policy that which learned counsel for the insurance company intentionally omitted?

It is the contention of counsel (on page 14 of his brief) that the word "law" as contained in the insurance policy includes municipal ordinances and that the violation of the city ordinance, not by the person who is operating the car but by the owner who employed a minor over 16 but under 18 to drive his car, forfeits the insurance.

In support of that contention he cites the case *In the Matter of the Mutual Life Insurance Company of New York,* 89 N. Y. 530. When the facts in this case are considered it will be apparent that the case is not an authority for the proposition contended for. The facts are as follows:

Under the provision of the Act of 1871 authorizing the Commissioner of Public Works of the City of New York

"to fix and establish the grades of streets" within a specified territory "where the same have not heretofore been fixed and established by law" not only were such grades excepted as had been fixed by legislative enactment but also those lawfully established by ordinance of the common council.

The assessment assailed in this proceeding was levied to pay the expense of grading 106th Street from Third Avenue to East River. The substantial error asserted is that the work was done without lawful authority and could not serve as the basis of a valid assessment. It was admitted that the Commissioner had a right to do the work upon the established grade, but he did more, he *changed* the grade and the question raised was—Did he have authority to do so? The authority claimed was derived from the Act of 1871 which empowered the Commissioner to fix and establish the grades of streets where they have not heretofore been fixed and established by law. It was admitted that the grade of 106th Street had been fixed and established by ordinance of the common council, but it was claimed that the Act of 1871 must be construed to except from the authority of the Commissioner only such grades as had been fixed by the act of the legislature and not such as had been established by ordinance. The court did not assent to this construction and said that *change* of grades was not authorized by the Act. The Act deals only with streets whose grades have not been established and where some authority must intervene to fix them for the first time. The Commissioner could fix grades where none had been lawfully determined. Where the grade had been lawfully established he was without power to make a change and since the grade had been established by the ordinance he was without authority to change the grade. In other words the grade having been established by a competent authority the Commissioner could not change the grade.

It is one thing to say this and another to say that an ordinance is a law within the meaning of an insurance policy.

Counsel cites to the Court the case of *Royal Indemnity Company vs. (Stewart) Schwartz,* 172 S. W. 581. This action was instituted by Schwartz against the Royal Indemnity Company to recover for expenses and attorney's fees in defending an action instituted against him, based on the alleged negligent act of his minor son who was under 18 years of age and who, while driving his father's car, killed a seven year old child. Schwartz notified the company of the accident and suit and when the company refused to defend, employed counsel at his own expense. A compromise was effected on the basis of $1,000.00 and then Schwartz instituted this action to recover from the insurance company expenses that he had incurred without, however, asking to be reimbursed for the $1,000.00. The insurance company refused to defend the suit against Schwartz on the theory that the automobile in question was being operated in violation of the city ordinance of El Paso. This ordinance provided that "it shall be unlawful for any person under the age of 18 years to drive an automobile within the city limits." The policy contained a provision that the company would not be liable for accidents if the automobile at the time of the accident was being driven by a person in violation of law as to age. The ordinance was held by the Court to be invalid and for that reason the judgment of the Court below awarding Schwartz $505.00, the amount of his expenses, was affirmed.

It will be observed that this ordinance prohibited one under 18 from driving. The ordinance in the case at bar does not and the decision was based on the fact that the ordinance in question was invalid. Therefore the quotation contained in plaintiff's brief on page 8 is merely *obiter dictum,* and in our judgment no authority whatever for counsel's proposition.

4. How Should the Phrase "Fixed by Law" Be Construed?

It is apparent from the cases cited by plaintiff and referred to in this brief and the cases cited by ourselves that the word "law" does not have a definite meaning, but is susceptible of at least two meanings. In a broad sense the word "law" includes all rules and regulations, irrespective of the source from which they originate, while in a strict sense law is a rule of civil conduct passed by a state legislature. In the United States and England the well recognized principles regulating civil conduct are designated the unwritten or "common law", and the written or "statute law". The meaning of the term "law" when taken in a broad sense is very different from that in a restricted sense. The word has two distinct meanings —it admits of duplicity of meaning and therefore it is ambiguous and it is our contention that because of this ambiguity of the word as used in the insurance policy that meaning must be adopted that will effect the purpose of the insurance policy, namely indemnity for the insured, rather than the meaning which might cause a forfeiture.

Section 3714 of the General Code, cited on page 14 of counsel's brief, specifically holds that municipal corporations shall regulate the use of streets in the manner **provided by law.** This phrase certainly does not refer to municipal ordinances but does refer to the laws enacted by the legislature, and the word "law" does not mean municipal ordinances but state statutes.

In the rule of construction laid down in 14 *R. C. L.* 1926, paragraph 103, we find that "such (insurance contracts) are to be most strongly construed against the insurer and in favor of the assured, especially where a forfeiture is involved, so that indemnity will be granted rather than denied."

Judge Denison in the case of *Wallace L. Schambs vs. Fidelity & Casualty Company,* 259 Fed. 55, laid down the rule that ambiguities in insurance policies are solved against the interests of the insurer, and further said in the opinion that:

> "This policy was drawn by the insurer; the company was presumably familiar with the common use and with the adjudged effect of this 'no action' clause; and it omitted that clause from this policy. It chose rather to rely upon language which lacks that certainty and freedom from ambiguity which might have been had, and the language which it selected must be construed according to the usual rules for ascertaining its true intent."

Where the words of a contract admit of an enlarged and a restricted meaning, a construction most beneficial to the promisee should be adopted. See 6 *R. C. L.* 854, and the cases there cited, particularly the case of *Webster vs. Dwelling Insurance Company,* 53 O. S. 558:

> "If it be left in doubt, in view of the terms of the instrument and the relation of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction will be adopted which is most beneficial to the promisee."

> "Where a policy of insurance is so framed as to make possible different interpretations of the same clause, that interpretation will be adopted in a suit upon the policy which is most favorable to the beneficiary."

Ferry vs. National Motor Underwriters, 244 Ill. App. 241.

> "A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent and of quite a different one in the hands of the adjuster."

Travelers Insurance Company vs. Dunlap, 160 Ill. 642-647.

"Contracts of insurance are construed strictly against the insurance company and liberally in favor of the assured and where two interpretations equally reasonable are possible, that interpretation should be adopted which will enable the beneficiary to recover."

Zeman vs. North American Union, 263 Ill. 304.

"If provisions in an insurance policy are with equal reason open to two constructions, that most favorable to the assured will be adopted."

Stipcich vs. Metropolitan Life Insurance Company, 277 U. S. 311. (72 Law Edition 895.)

See also cases cited by Mr. Justice Stone in the opinion of the court, page 322 (900).

Judge Westenhaver's opinion (Record page 21) of the rule we think is very well supported by authority. He says:

"If the language of a covenant or condition exempting the insurer from liability is susceptible of two constructions or meanings, that will be adopted which is most favorable to the insured. The expression 'by law' is at least susceptible of two constructions. It may mean or be fully satisfied by limiting it to a law enacted by the Legislature of a State. Ordinarily, when one speaks of the 'law,' this is what is meant. One thus speaking, has in mind a rule of conduct of uniform and general application prescribed by the supreme law-making body of some sovereignty."

As lawyers we speak of state laws and municipal ordinances, thereby drawing in our own minds a distinction between a *law* passed by a state legislature and an *ordinance* passed by a municipal council. When we say a person has violated the law we mean that he has vio-

lated the state law and when he is charged with violating a municipal ordinance we do not say he has violated the law—we say he has violated the ordinance. This is the ordinary distinction that we carry in mind and people who are not lawyers have in mind the same distinction.

We are strengthened in our opinion that **an ordinance** is not a **law** within the meaning of the policy by what the Supreme Court of Ohio has said in its journal entry in the case of *F. H. Fullwood vs. the City of Canton*, 116 O. S. 732. Fullwood had for a number of years been engaged as an electrician in the City of Canton; in November, 1925, the Council of the City of Canton passed an ordinance creating a board for the examination and licensing of master electricians, prohibiting the plying of the trade by any one not licensed, and fixing a penalty for the violation of any of its provisions. Fullwood challenged the constitutionality of the ordinance and the question was raised in the Supreme Court of Ohio as to whether or not the **ordinance** was a **law** within the meaning of the following clause of the state constitution appearing in section two, article four—

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void."

It will be observed that the same word "**law**" is used in the Ohio constitution as is used in the policy of insurance under investigation. The following appearing on page 733 we think very pertinent to the question at issue in the case at bar:

> "Four members of this Court, Marshall, *C. J.*, Kinkade, Jones and Matthias, *JJ.*, hold that an **ordinance** of a municipality **is not a law** within the meaning of section two, article four (of the constitution), but Jones and Matthias, *JJ.*, holding this par-

ticular ordinance to be constitutional cannot consistently join in a judgment of reversal."

It will thus be seen that if our question—"Is an ordinance a law within the meaning of this insurance policy?" were presented to the Supreme Court of Ohio its answer would be "No." It therefore follows that even though the ordinance had in fact fixed the age limit of a driver at eighteen, still the violation of that ordinance would not justify the insurance company in its refusal to carry out the terms of its policy issued to Guenther, defend his lawsuit at its own expense and pay the judgment up to the amount indicated in the policy.

In the case of *Rosenberg vs. the City of Selma*, 168 Ala. 195, the plaintiff was convicted of violating an ordinance of the City of Selma with reference to the sale of liquor, the affidavit apparently charging him with doing the act "contrary to law." He appealed and the Court in its opinion said that the interpretation of the term "law" unless otherwise qualified is in penal proceedings presumed to refer to the common law, provided of course, statute has not given to the term another meaning. By statute "contrary to law" has been appropriated to the definition in indictments of violation of *statutes* touching the sale, etc., of prohibited liquor.

> "So far as we are advised the phrase has not been *thought apt or fit* in the allegation of a violation of any municipal ordinance. The mere fact that the City of Selma appears to be the complainant against appellant cannot, we think, avail to give the expression 'contrary to law' a meaning and effect equivalent to the express averment that in doing the act described the appellant violated the ordinance of the City of Selma. With that in this case he must have been clearly charged. Without that unequivocal allegation the complaint was defective."

In the case of *Taylor vs. Philadelphia,* 261 Pa. 458, it was held that an ordinance is not a law within the meaning of the constitutional provision prohibiting local or special legislation and the Court on page 465 of the opinion says:

> "The reason upon which the Act of 1917 is unconstitutional cannot apply because *ordinances are not laws* within the meaning of the constitutional provision prohibiting local or special legislation."

and in support of that proposition cites *Baldwin vs. Philadelphia,* 99 Pa. 164; *Davis vs. Homestead Boro,* 47 Pa. Superior Ct. 444; *McCormick vs. Fayette County,* 150 Pa. 190.

Wright vs. Mayor and Council of Macon, 5 Ga. Appeals 750 was an action brought to reverse the conviction of the violation of a "locker" ordinance. In the course of the opinion and on page 763 the Court said:

> "The contention that municipal ordinances are necessarily included or intended by the use of the word 'law' in the proviso to the Tax Act cannot be sustained. Ordinances are mere rules or by-laws of a municipal corporation. In *Bearden vs. Madison,* 73 Ga. 184, it was held that the ordinances referred to had the *force* of law and yet they are distinguished from the law of the land, but it cannot be presumed that the legislature in using the word 'law' in the proviso to subdivision 47 of section 2 of the Tax Act had in mind the by-laws of municipalities any more than it was considering the laws of nature, for the Court does not take judicial cognizance of municipal ordinances" * * * "that the word 'law' does not ordinarily include municipal ordinances, see 21 *American and English Encyclopedia of Law;* 29 *Central Digest* 834, paragraph 122; *Williams vs. Augusta,* 4 Ga. 513; *Mabra vs. Atlanta,* 78 Ga. 679; *Haywood vs. Savannah,* 12 Ga. 410."

It is apparent therefore that the word "law" has both a broad and a restricted meaning and in our case that meaning should be adopted which will grant indemnity rather than forfeit the insurance. To adopt the construction contended for by petitioner, the Court would have to disregard Section 13002 of the General Code and construe the clause under consideration as though it were written

> This policy shall not cover any liability of the assured while the insured automobile is being operated by any person under the age limit fixed by law; or when it is being operated by any person under 18 years of age, in the event that it shall be made unlawful by a municipal ordinance to permit such vehicle to be operated by one under the age of 18; or under the age of 16 in any event.

When the question is thus presented, it is perfectly apparent that the Courts below could not so construe this clause and hence there was nothing to do except to enforce the contract and this was done. The judgment of the Court of Appeals in affirming that of the District Court was absolutely correct, and therefore there is no question in this record calling for any decision by this Court.

CONCLUSION.

1. Neither Guenther nor his employe at the time of the Kroger accident was operating the automobile in violation of Section 13002 of the General Code. The automobile therefore at the time of the accident was not being operated by any person under the age limit fixed by law.

2. The operator of Guenther's automobile was not violating the Lakewood ordinance as to age.

3. A municipal ordinance is not a law within the meaning of the term "fixed by law" as used in the policy.

4. The policy contains no provision exempting the company from liability where the insured automobile is being operated in violation of any provision of the municipal ordinance as to age.

5. The phrase "under the age limit fixed by law" can be fully satisfied by reference solely to the laws of the state, thereby avoiding forfeiture and affecting the purpose of the insurance contract, namely—indemnity for the insured.

We feel therefore that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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